



POLICE DEPARTMENT

March 6, 2014

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Julio Alvarez
Tax Registry No. 927779
Property Clerk Division
Disciplinary Case No. 2008-0249

The above-named member of the Department appeared before me on July 29, 2013, September 18, 2013, and January 30, 2014, charged with the following:

1. Said Police Officer Julio Alvarez, while on duty and assigned to Narcotics Borough Brooklyn South, on or about September 13, 2007, in Kings County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Police Officer knowing that a written instrument (Criminal Court Complaint Report) contained inaccurate information, offered it to the Kings County District Attorney's Office. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS
PERFORMANCE ON DUTY
NYS Penal Law Section 175.35

2. Said Police Officer Julio Alvarez, while on duty and assigned to Narcotics Borough Brooklyn South, on or about September 13, 2007, in Kings County, failed to make and/or caused inaccurate entries to be made about the arrest of Person A in both the Criminal Complaint and the On Line Booking System Arrest Report. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 PROHIBITED CONDUCT
NYS Penal Law Section 175.05 – FALSIFYING *[sic]* BUSINESS RECORDS
IN THE SECOND DEGREE

3. Said Police Officer Julio Alvarez, assigned to Narcotics Borough Brooklyn South, on or about September 13, 2007, at a location known to this Department, in Kings County, with intent to obtain a benefit or deprive another person of a benefit did commit

an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act was unauthorized.

NYS Penal Law Section 195.00(1) – OFFICIAL MISCONDUCT

4. Said Police Officer Julio Alvarez, assigned to Narcotics Borough Brooklyn South, on or about September 13, 2007, at a location known to this Department, in Kings County, knowing that a written instrument contained a false statement or false information, he offered or presented it to a public office or public servant with the knowledge or belief that it would be filed with, registered or recorded in or otherwise become a part of the records of such public office or public servant.

NYS Penal Law Section 175.30 OFFERING A FALSE INSTRUMENT FOR FILING IN THE SECOND DEGREE

5. Said Police Officer Julio Alvarez, assigned to Narcotics Borough Brooklyn South, on or about September 13, 2007, at a location known to this Department, in Kings County, did commit the crime of falsifying business records in the second degree and his intent to defraud included an intent to commit another crime or to aid or conceal the commission thereof.

NYS Penal Law Section 175.10 – FALYSIFYING [sic] BUSINESS RECORDS IN THE FIRST DEGREE

The Department was represented by Michelle Alleyne, Esq., Department Advocate's Office, and Respondent was represented by Rae Downes Koshetz, Esq.

The Department dismissed Specification Nos. 4 and 5 before the commencement of trial. Respondent, through his counsel, entered a plea of Not Guilty to the remaining charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Sergeant [REDACTED], Detective [REDACTED], Detective [REDACTED] and Sergeant [REDACTED].

Sergeant [REDACTED]

In 2007, [REDACTED] was an undercover detective assigned to Narcotics Borough Brooklyn South (NBBS). On September 13, 2007, following a court appearance, Bardash joined the 60 module team in a buy and bust ("B & B") operation. The team included Sergeant [REDACTED], and Detectives [REDACTED] and [REDACTED]. He also believed that Respondent was part of the team. [REDACTED]'s function was to work as a backup for other undercover officers in an undercover vehicle, a [REDACTED]. The operation was in the [REDACTED] area of [REDACTED] in the [REDACTED] Precinct. [REDACTED] did not know the exact time but noted that it was after 4:00 p.m. [REDACTED] had parked his vehicle on [REDACTED] Avenue, but he did not recall on which street. He said that this was the "general area for setting up," where undercover officers "felt safe to park and step from."

While [REDACTED] remained in the vehicle, [REDACTED] and [REDACTED] were working undercover trying to make narcotic buys. The primary means of communication between the officers was by Department-issued cell phones or personal cell phones. [REDACTED] explained that with the Nextel cell phones, the primary method of communication was through "chirping." He also monitored the TAC channel on the radio, and if anything was going on he would have alerted the undercover officers by phone.

At some point the undercovers contacted [REDACTED], he believes by phone, to pick them up. On the way to pick them up, he got lost. [REDACTED] did not know the street but believed it was in the vicinity of [REDACTED] Avenue in the twenties. He said it took approximately 20 minutes for him to pick up the undercover officers. When he arrived, [REDACTED] and [REDACTED] were not happy. When they got into the vehicle, [REDACTED] believes that [REDACTED] said he had not made a buy but that [REDACTED] had. [REDACTED] said he did not get any information from them about "moving in on someone." He went on to explain that he could not become involved in an arrest because he was an undercover: "The whole purpose to deal with the set in an undercover capacity is to blend in with the area, for them not to know I'm an officer so that we can make buys in the future."

On cross-examination, [REDACTED] agreed that he had a Departmental disciplinary matter pending. He also agreed that he had been criminally prosecuted for having an illegal device on his vehicle that concealed his actual license plate.

[REDACTED] recalled that "quite some time after" September 13, 2007, he was asked about that day for the first time. He was relieved to realize that he was not part of any allegation of wrongdoing. At the time he was questioned, he did not have any independent recollection of that day. [REDACTED] said he definitely remembered picking the undercover officers up but he did not know where or when. He did not have much recollection of that day.

On re-direct examination, [REDACTED] confirmed that he did make any buys that day and he did not believe that he got out of his vehicle to assist the module team. [REDACTED] also recalled that [REDACTED] had said that he had not made any buys that day, but that [REDACTED] had.

Detective [REDACTED]

[REDACTED] is a 13-year member of the service and is currently assigned to Narcotics Borough Brooklyn North. In 2007, [REDACTED] was assigned to NBBS as an investigator. He was responsible for investigating kites, narcotics-related cases that were called in, as well as operating out in the field in a SNEU or "B & B" operation with a team.

[REDACTED] agreed that NBBS was a fairly large command. He stated that the larger precincts had two teams assigned to them, and he was assigned to teams that had a combination of two precincts. [REDACTED] was assigned to the [REDACTED] module, the [REDACTED] module, the [REDACTED] module and the prisoner van which dealt with the prisoner transport. He testified that the [REDACTED] module covered [REDACTED] and [REDACTED]. [REDACTED] stated that a B & B operation refers to undercover officers going out into the field, after receiving information in a kite, from information obtained on their own, or just walking around the street in an attempt to buy narcotics which would result in a search warrant or the individual being arrested that day. Lloyd stated that for "[s]everal hundred days we went out and did B&B over my time in Brooklyn South."

[REDACTED] testified that the teams were broken down into individual responsibilities: a sergeant or lieutenant would be in charge of the team or module for the day; and the investigators would [REDACTED]

[REDACTED] There would also be an arresting officer and if there was an extra person, he or she might assist in the vehicle by helping out with the equipment in the car.

[REDACTED] [REDACTED] stated that there were usually between [REDACTED] [REDACTED] to the module, but it did not mean that they were all out on

assignment on any given day. [REDACTED] never worked as an undercover but he worked with undercovers.

[REDACTED] described the configuration of the B & B operation teams. He stated that

[REDACTED]
[REDACTED]
[REDACTED].

On September 13, 2007, Lloyd was assigned to Team 1 of the B & B operations which covered the [REDACTED] precinct areas of [REDACTED] t and [REDACTED]. He was in an

[REDACTED]. Police Officer [REDACTED] was his partner. The second [REDACTED] consisted of Detective [REDACTED] and Police Officer [REDACTED]. They were all in plain clothes. The supervisor for that day was Sergeant [REDACTED] and the arresting officer was Respondent. They were both in the leader car. Detective [REDACTED] and Police Officer [REDACTED] were assigned to the prisoner van. Detectives [REDACTED] and [REDACTED] were assigned as undercover officers. There was a third undercover officer but [REDACTED] could not recall the name. [REDACTED] stated that he had previously worked with [REDACTED], who worked only as an undercover. He could not recall if [REDACTED] made any buys on September 13, 2007.

On the date of the incident [REDACTED] was the operator of the Team 1 chase car. He did not personally observe anything that he would consider to be a hand-to-hand transaction happen. When asked how the information would be communicated to the operations team if a suspect had to be apprehended, [REDACTED] stated:

[REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] testified that on September 13, he recalled hearing a communication about an individual to be stopped, but he could not remember if it was through the Department radio or through his personal cell phone. He stated that everyone should have a Department radio; some had their personal cell phones or had Department cell phones.

[REDACTED] stated that generally the information relayed would be the description of the individual, where he was or the direction where he was going so that they could go apprehend him. He knew that he was to place the individual under arrest because he was receiving the information from another member of the field team.

[REDACTED] stated that on September 13, 2007, he was sitting in the vehicle on [REDACTED] Street between [REDACTED] and [REDACTED] Avenues when the communication was received to apprehend someone. He made a left turn onto [REDACTED] Avenue and saw an individual fitting the description from the communication. The individual was in the middle of the street, crossing the street from the north side, coming toward [REDACTED]. [REDACTED] learned that the individual was Person A. He never had any interaction with Person A before September 13, 2007. [REDACTED] did not see Person A interacting with anyone nor did he see Person A engaging in a hand-to-hand transaction. He stated that there were a few people in the street since it was evening but it was not overly crowded.

[REDACTED] testified that when he made a left turn and stopped the van, Person A was next to the front side of the bumper and the front passenger door, closest to [REDACTED]. [REDACTED] stated that [REDACTED] got out of the vehicle first and made contact with Person A. [REDACTED] put the

vehicle in park and got out to help [REDACTED]. He stated that Person A did not try to flee or resist being placed under arrest. After Person A was handcuffed, [REDACTED] searched him to look for weapons, but found none. He walked Person A over to the prisoner van that was located on the corner of [REDACTED] Avenue and [REDACTED] Street. [REDACTED] drove the van over to where the prisoner van was.

[REDACTED] remembered seeing [REDACTED], [REDACTED], and Respondent. He stated that [REDACTED] was talking on his cell phone. One other person was arrested and was in the area at the time. He did not see the undercover because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] stated that there was a store on the corner of [REDACTED] Street and [REDACTED] Avenue and he was able to identify it in Department's Exhibit (DX) 1, which is a photograph of the location with the store in the background.

[REDACTED] did not speak with Respondent about any arrests he might have made on September 13, 2007, or about Person A's arrest. [REDACTED] left the location after he handed Person A over to the prisoner van. He did not fill out any paperwork nor did he assist anyone in completing Person A's arrest paperwork.

During cross-examination, [REDACTED] stated that his recollection about September 13, 2007, was "very vague up until the spot" where he stopped Person A. He made Activity Log entries but he did not prepare any reports regarding the arrest. The arrest was made between [REDACTED] and [REDACTED] Streets and [REDACTED] Avenue. [REDACTED] wrote in his Activity Log that there were "2 under [REDACTED] Avenue, [REDACTED] Street" at 5:30 p.m., which meant that there were two arrests. He could not recall the name of the second person who

was arrested. He testified that the first time he saw the second person who was arrested was when the person was next to the prisoner van which was located on [REDACTED] Street. [REDACTED] could not recall how long he was parked before he left to pick up Person A.

Detective [REDACTED]

[REDACTED] is a twelve-and-a-half-year member of the Department and is currently assigned to the 6 Precinct. On September 14, 2007, [REDACTED] worked in NBBS as an undercover. The supervisor assigned him to work as an undercover to buy drugs. [REDACTED] stated that there was a TAC plan to make a buy. [REDACTED] who was assigned as an undercover, had a case buy.

The Brooklyn District Attorney's Office was involved in the case buy and provided a box of [REDACTED] to the command. [REDACTED] had a [REDACTED] that could [REDACTED] and [REDACTED] had a [REDACTED] also, but [REDACTED] was not sure what type. He believed that the box of [REDACTED] also contained a [REDACTED] which can be [REDACTED]. [REDACTED] usually worked in the 70, 71, 76 and 78 module teams. [REDACTED] worked in the 60 and 61 module teams.

On September 14, 2007, Neve was with [REDACTED] driving to the case buy. He stated that [REDACTED] was talking and "said something like 28 but really 18" or "17 but really 28. One of the two combinations." [REDACTED] said that they laughed. He could not recall what [REDACTED] had said before this but he thought that it was about the day that [REDACTED] went out. It was only later that [REDACTED] realized Johnstone had been talking about bags of narcotics.

On cross-examination, [REDACTED] testified that he pled guilty to failing to report corruption. For this misconduct, he forfeited 65 suspension days and was placed on one year dismissal probation. [REDACTED] never mentioned Respondent's name during the conversation on September 14, 2007. [REDACTED] had no information that Respondent committed any misconduct whatsoever.

Sergeant [REDACTED]

[REDACTED] a 19-year member of the Department, is currently assigned to the Internal Affairs Bureau (IAB). In 2007, he was assigned to investigate the alleged misconduct that [REDACTED] mentioned in his September 14 conversation with [REDACTED]. The conversation was captured on a [REDACTED] that was inadvertently left on, and was brought to the Department's attention by the Brooklyn District Attorney's Office. The District Attorney's Office had originally notified the Department of "FADO"¹ allegations that two undercover officers were heard on the recorded conversation cursing and using racial slurs. Once the Department reviewed the recording, [REDACTED] statements about the narcotics were discovered.

According to [REDACTED], [REDACTED] specifically stated in the recorded conversation that he was doing a B & B operation with [REDACTED] and [REDACTED]; that [REDACTED] made a narcotics purchase; and that while he [REDACTED] was keeping that person under observation, he "puts over a guy to the field team, they apprehend him, they get 28 bags of cocaine and they only voucher 17." [REDACTED] who had worked in Narcotics Division for five years, understood what [REDACTED] was referring to.

¹ (Unnecessary Use of) Force, Abuse of Authority, Discourtesy, Offensive Language.

During the course of his investigation, [REDACTED] identified the person who [REDACTED] purchased drugs from as Person B and identified the person who was arrested nearby with 28 bags of cocaine as Person A. [REDACTED] subsequently interviewed Person A at the District Attorney's Office. Person A was initially uncooperative, but after being informed that he had immunity he stated at the interview that he had 28 bags on the day of his arrest but was charged with less. Person A explained at the interview that he had bought 30 bags of cocaine in Manhattan for personal use, and he ingested two of the bags on his ride to Brooklyn. He got off the train at [REDACTED] and observed police effecting an arrest as he walked along [REDACTED] Avenue. That is when [REDACTED] and [REDACTED] stopped him. [REDACTED] found the narcotics on Person A and took Person A to the prisoner van. Person A recognized Person B inside the van, as they knew each other from the neighborhood. Person A stated in the interview that he did not conduct any drug sales or interact with anyone in the area of [REDACTED] Avenue and [REDACTED] Street on that day.

Records showed that Person A had been arrested by the same field team in the same area in March 2007. [REDACTED] noted that Respondent was not involved in the March 2007 arrest, and was only involved in the September 13 arrest. About this previous arrest, Person A stated in his interview that he was in possession of a large quantity of narcotics, a larger amount than what he was charged with. Members of the [REDACTED] module were charged with conspiracy to distribute narcotics and falsifying business records. [REDACTED] was ultimately found guilty of this criminal activity.

On September 13, 2007, Respondent was assigned to process all arrests the module made that day. Respondent noted on the criminal affidavit and supporting deposition for Person A's arrest that he observed Person A conduct a hand-to-hand transaction.

Person A testified in the criminal case against [REDACTED] and Respondent. DX 2 is Person A's criminal court testimony. Person A was unwilling to testify at this Department trial.

[REDACTED] told [REDACTED] in an interview that he did not recall seeing Person A on the scene. About Person B, [REDACTED] stated that after receiving a communication from [REDACTED] about [REDACTED] making a buy, he [REDACTED] and Respondent apprehended Person B inside a 99-cent store located on [REDACTED] Avenue between [REDACTED] and [REDACTED] Streets. [REDACTED] did not see any other narcotics sales or hand-to-hand transactions while going inside to apprehend Person B. Upon exiting the store, [REDACTED] received another communication from [REDACTED] or perhaps another undercover on the team about "another person that they had." This communication resulted in the team apprehending Person A. DX 3 is [REDACTED] testimony at the criminal trial. [REDACTED] has retired from the Department and was unwilling to testify at this Department trial.

On cross-examination, [REDACTED] confirmed that there is a set procedure for the handling of recovered narcotics: the procedure involves maintaining a chain of custody so that the recovering officer stays with the drugs until they are vouchered, and it is the job of the supervisor to ensure that proper procedures are followed. In this case, procedure was not followed, as [REDACTED] directed the recovering officers to hand the narcotics over to the officers in the prisoner van. For this misconduct, [REDACTED] was disciplined for failure to supervise.

Person A's initial version of the incident was that he originally had six bags of narcotics on him and that the field team added an additional 11 bags in order to charge him with a felony. When informed that this version did not make sense, Person A stated in

sum and substance that he was just “trying to feel the investigators out.” Person A had a number of narcotics arrests and also had a history of being violent with his girlfriends.

Seventeen bags of narcotics were vouchered as a result of Person A’s arrest. The determination that there were originally 28 bags was based on [REDACTED] recorded conversation and Person A’s interview. Respondent was acquitted of all charges at his criminal trial.

On redirect examination, [REDACTED] testified that Respondent was charged criminally with conspiracy to distribute narcotics and falsifying business records. The conspiracy to distribute charge was based on the belief that recovered drugs were not being vouchered and were instead being planted on innocent people.

DX 4 is the criminal court complaint for Person A’s arrest. The complaint states that, according to Respondent, 17 bags of cocaine were recovered from Person A’s person. DX 5 is the online booking sheet.

Respondent’s Case

Respondent testified in his own behalf.

Respondent

Respondent, a 13-year member of the Department, is currently assigned to the Property Clerk Division. He has never before been served with Department charges. The only time he has reported sick was for line-of-duty injuries after an accident with a Department vehicle. He has a bachelor’s degree in forensic psychology. He was assigned to NBBS in October 2006.

On September 13, 2007, Respondent, as the arresting officer, was responsible for 11 arrests that his team made.² The team had an established protocol for the handling of narcotics recovered during the operation. The protocol was for the arresting officer to put the narcotics in an unsealed manila envelope and give it to the officers in the prisoner van. The narcotics stayed in the van, sometimes for hours, until the operation was over and the team returned to the command. Upon their return, the members assigned to the van placed the envelopes on the desk in front of the sergeant and arresting officer. The arresting officer then started the paperwork. At some point, the arresting officer and the sergeant removed the narcotics from their envelopes and counted it. The sergeant then placed the narcotics into narcotics envelopes which in turn went into security envelopes. The sergeant sealed and signed the security envelopes and brought them to the property room.

On the day of the incident, Respondent conducted searches of all people arrested, but he did not at the time count the number of drug containers recovered. He explained the reasoning for this: "Because since we are in the street, in a busy street, what tends to happen is a crowd starts forming and we don't want any of the people that we arrested, we don't want any of their friends to come and try to hurt us or something and help the person arrested escape." This is why the recovered narcotics were immediately placed in envelopes and brought to the prisoner van. Respondent did not have anything to do with the drugs between the time he put the drugs in the unsealed envelopes and the time he returned to the command.

Respondent testified that [REDACTED] made a buy from Person B, and the ghost transmitted to [REDACTED] that Person B walked into the store located at the corner of [REDACTED]

² Ten of those arrests were processed, and one summons was issued.

Avenue and [REDACTED] Street. [REDACTED] and Respondent drove toward the store, and as Respondent stepped out of the car he saw Person A across the street making a hand-to-hand transaction. Person A and Respondent were 100 to 150 feet apart from each other, and Respondent was able to see Person A exchange bags of cocaine for currency. Respondent continued to walk toward the store to apprehend Person B because he had learned in training that for the safety of the team "we have to take care of the task at hand, our job, before walking off alone to conduct any other police action." As Respondent was doing paperwork for Person B's arrest, he saw [REDACTED] and [REDACTED] escorting Person A in his direction. Respondent believed that [REDACTED] had received a communication pertaining to Person A via Nextel cell phone. He had never seen Person A before that day. Respondent proceeded to search Person A and remove narcotics from his person, placing the narcotics in a manila envelope and giving it to [REDACTED] and [REDACTED] in the prisoner van. He next saw the envelope a few hours later back at the command. No effort was made to catch the person who was observed purchasing drugs from Person A because the team was short-staffed at the time. After Person B and Person A were placed in the prisoner van, Respondent kept an eye out for that buyer but never saw him again.

Respondent worked on the same team as [REDACTED], but they were not close and did not have personal conversations with each other. Respondent's Exhibit (RX) A is a map of the vicinity where the team was working on the day of the incident. Respondent described the area as having high drug activity. RX B is a photograph of Sami Deli and Grocery, which is the corner store that Person B entered. RX C is a photograph of the location where Person A was standing when Respondent saw him conduct the drug

transaction. RX D is a photograph of the 99-cent store, which was located two doors down from Sami Deli and Grocery.

Respondent told the District Attorney's Office that he observed Person A sell narcotics to an unapprehended other. He did not make any false statements about what he saw that day, nor was he involved in any kind of misconduct or illegal activity with regard to the handling of drugs. He testified, "I didn't do anything wrong on that day. I love this job . . . and I am not going to risk this job for anything or anyone."

On cross-examination, Respondent testified that he worked closely with [REDACTED] on September 13, 2007 and did not lose sight of him at any point that day. Respondent heard the transmission about Person B entering the corner deli over the team radio. Respondent and [REDACTED] were located about a block-and-a half from the deli at the time, and it took under five minutes to drive there. Respondent parked the car on the same side of the street as the deli, with the passenger's side [REDACTED] side of the car) near the sidewalk in front of the deli. Respondent exited the car on the street side, and it was directly in front of him that he saw Person A across the street making the drug transaction. Respondent did not see in which direction Person A and the buyer walked because he turned to look inside the deli. [REDACTED] and [REDACTED] had already entered the deli to apprehend Person B, and Respondent was looking to make sure they were okay.

When Respondent and [REDACTED] arrived at the deli, the prisoner van was parked alongside the deli on [REDACTED] Street. Respondent did not know where the chase car containing [REDACTED] and [REDACTED] was parked or where the undercovers were positioned. Respondent did not recall how much time passed between the time [REDACTED] and [REDACTED] entered the deli and the time Person B was escorted out of the building. Respondent never

actually entered the deli but remained just outside the doorway. Respondent did not recall who handcuffed Person B. Respondent found marijuana on Person B.

██████ and ██████ apprehended Person A in the area of ██████ Avenue and ██████ Street. Respondent did not know at the time how ██████ and ██████ learned about Person A's transaction, but he later learned at trial that ██████ made a transmission about it. Respondent did not see ██████ or ██████ at the scene. The only team members that Respondent saw in the area at the time of Person A's transaction were ██████ and ██████, and ██████ was running into the deli. It was 5:30 p.m., and there were civilians in the area, but Respondent's view of Person A's transaction was unobstructed. Respondent was able to tell that it was a hand-to-hand sale of narcotics because of his experience. He had been working at NBBS for just under a year at the time and grew up in a drug-infested area. He had seen hand-to hand transactions before. The information he gave the District Attorney's Office about his observations of Person A was accurate.

FINDINGS AND ANALYSIS

The background of this case is generally not in dispute. All of the charges stem from events that occurred on September 13, 2007. On that day, Respondent was working with a team from Narcotics Borough Brooklyn South led by now-retired Sergeant ██████. Among the other officers on the team were then-Detective (now-Sergeant) ██████, and former Detectives ██████ and ██████. These officers were involved in an operation designed to make arrests of drug dealers and their customers in the vicinity of ██████ Avenue and ██████ Street in the ██████ section of Brooklyn, in the ██████ Precinct.

Ten individuals were arrested and one was issued a summons during the operation that day. One of those arrested was a man named Person B. Person B had apparently conducted a drug transaction with one of the undercover officers and a call was put out to arrest him. He had gone into a store on the corner of [REDACTED] Street and [REDACTED] Avenue.

Respondent's version of events is that he drove over to that location with [REDACTED]. As he got out of the car, Respondent said he saw Person A engage in a hand-to-hand drug transaction down the block and across the street. Respondent said he did not do anything about the observation at that moment because he was aiding in the apprehension of Person B.

Person A was later apprehended near the scene and was found to be in possession of a number of bags of cocaine. Seventeen bags were vouchered and attributed to him.

Sometime later, [REDACTED] was heard on a recording made with a [REDACTED], speaking when he did not know the device was recording. In this accidentally recorded conversation, [REDACTED] discussed the fact that someone who been arrested on September 13, 2007, actually had 28 bags of cocaine when he was arrested and that 11 bags had been put aside for later use by the officers. That arrestee was determined to have been Person A.

An investigation was conducted and several officers were indicted for various criminal acts. Among them were [REDACTED], [REDACTED] and Respondent. [REDACTED] and [REDACTED] were convicted; Respondent was acquitted.

In her opening statement, the Assistant Department Advocate made clear the Department's theory in this disciplinary matter is different than the theory presented by

the District Attorney in the criminal case. The Advocate emphasized that while the District Attorney believed that Respondent was a co-conspirator with [REDACTED] and [REDACTED] in their plot to, in essence, steal some of the drugs that should have been vouchered, the Advocate was alleging only that the information Respondent provided to the Department and the District Attorney as the basis for arresting Person A was false. In sum, the Advocate claims that Person A was not involved in a hand-to-hand drug transaction and that all the documents Respondent prepared in which he claimed to see such a transaction are false. This is the factual argument behind all of the charges.

The Advocate has made various arguments about why her office believes Respondent could not have seen the alleged hand-to-hand drug transaction. The Advocate claimed that Respondent was too busy with Person B, that he was too far away to observe a drug sale and that Person A would not engage in a drug transaction in sight of a police operation. Most significantly the Advocate relies on Person A's claim that he did not engage in a hand-to-hand drug transaction that day. Whether Respondent lied when he claimed to have seen Person A engage in a hand-to-hand transaction is the sole issue at this trial.

As I noted earlier, the investigation into the Person A arrest occurred because of an inadvertently recorded conversation [REDACTED] had been involved in. That conversation had taken place the next day, September 14, 2007. Respondent was not part of that conversation and apparently was not in the vicinity when it occurred.

Someone in the District Attorney's Office heard the unintentionally recorded conversation and noted that it was laced with racial slurs and vulgarities. That person reported the matter to IAB as a "FADO" complaint.

The recording was turned over to Sergeant [REDACTED] of IAB who had previously worked in narcotics enforcement. In his review of the recording, he heard [REDACTED] tell Detective [REDACTED] something to the effect that he had had a case buy of 17 which was really 28.

The District Attorney had not understood the significance of this comment, but [REDACTED], with his experience, recognized it to be a statement which indicated that [REDACTED] had arrested someone with 28 bags of cocaine but that only 17 of those bags had been vouchered. Upon investigation, he determined that the person [REDACTED] was talking about was Person A.

Person A was brought, with his attorney, to the District Attorney's Office and offered some kind of cooperation agreement. Person A admitted to having been in possession of bags of cocaine.

During his interview at the District Attorney's Office, Person A had initially claimed that he had been arrested with fewer than the 17 bags of cocaine with which he had been charged. He claimed the police had augmented what he had to bring him up to felony weight. Later he changed his story and said that he had been arrested with 28 bags and that only 17 had been vouchered. It was at that point that he said he had purchased 30 bags and ingested two on the way home. Person A denied engaging in a hand-to-hand sale of cocaine on September 13, 2007.

Respondent was charged criminally in connection with the events of September 13, 2007. He was the subject of a trial before Justice John Walsh in December 2010. That trial resulted in an acquittal of Respondent. Person A did not testify at this disciplinary

proceeding. He did testify at the criminal trial. A transcript of Person A's testimony at that trial was entered into evidence at this proceeding (DX 2).³

The Advocate, in both her opening and closing arguments, offered a theory of what occurred. She suggested that [REDACTED] knew Person A from an arrest he had made of Person A in March 2007, about six months earlier. She suggested that [REDACTED] called in the arrest of Person A believing that Person A would have drugs on him. She further suggested that when drugs were found on Person A, Respondent, apparently in cahoots with [REDACTED], made up the story of the observation sale. When asked, the Advocate explained that this version of events was based on Person A's testimony that he had not conducted a hand-to-hand drug sale.

The witnesses who testified at this proceeding add essentially nothing to help determine the simple and central question in this case: Did Respondent lie when he said he saw Person A engage in a hand-to-hand drug transaction?

[REDACTED] was part of the team but saw nothing of significance to the issue in this case. Indeed, [REDACTED] got lost driving around the area at what may have been the period of time when the hand-to-hand would have occurred. [REDACTED] too was a member of the team but his involvement was to arrest Person A after the call went out. He had no information about anything that occurred that might have led to that call. [REDACTED] was not present for the operation on September 13, 2007. His testimony only related to the conversation he had with [REDACTED] on the next day, September 14, 2007. The last witness the Advocate called, [REDACTED], was the investigator on the case and was obviously not present when the events charged occurred. What this shows is that the Advocate's

³ ~~It should be noted that there was a long delay from the commencement of this disciplinary proceeding in July, 2013 until the completion of testimony in January, 2014. Most of that delay was due to difficulties in obtaining transcripts of testimony given during that criminal trial.~~

entire case rests on credibility and reliability of Person A's claim that he did not engage in a hand-to-hand drug transaction on September 13, 2007.

██████ did not testify at this proceeding. His prior testimony, given at the criminal trial, was offered in evidence (DX 3). In that prior testimony, ██████ stated that when he and Respondent pulled up to the area where Person B had gone into a store, he and Respondent entered that store. ██████ said that when they got inside, Person B was already in custody. He also said that it was at that point in time that he got a call from ██████ indicating that Person A should be arrested for a drug sale.

This prior testimony from ██████ would offer some support for the Advocate's version of what occurred. It would also undermine Respondent's version of events, yet the Advocate did not refer to this testimony as supporting her case. I do not know the reason for this, but I have my own reasons to suspect the accuracy of ██████ testimony; that is, that on cross examination ██████ certainty about the events of September 13, 2007 waivered. For instance, he could not remember if it was really ██████ or someone else who called. He could not remember where he and Respondent came from to make the Person B arrest and he could not even remember in which direction their car was facing as it came to the scene.

As the supervisor, ██████ should have reviewed the arrest paperwork which presumably listed the Person A arrest as the result of an observation by Respondent.

██████ was not asked about this at the criminal trial but he might well have been had he appeared as a live witness in this proceeding. This brings us to the central problem of hearsay testimony: there is no ability to question the witness. Certainly at this proceeding, which is more attuned to police procedures, ██████ could have been asked

about this apparent inconsistency between his claim to have gotten the call on Person A while he was in the store with the version by Respondent who claimed to have seen the drug transaction involving Person A.

Also significant is the fact that if [REDACTED] had made an observation of Person A doing a hand-to-hand or even if he falsely claimed to have made such an observation, then the case could easily have been written up as being based on information provided by [REDACTED] who was an undercover and identified routinely by his "UC" number. In other words, there was no need to incorporate Respondent into the case as the observing officer.

As I have said, the Advocate did not rely on [REDACTED]'s testimony and in this case I see no reason to rely on the hearsay representation of what [REDACTED] said.

[REDACTED], it should be noted, who is now retired, acknowledged during his testimony that he was subject to Departmental disciplinary action for failing to supervise and suffered a substantial penalty.

One other issue related to this raised by the Advocate was the claim that [REDACTED] put out the transmission regarding Person A. The source of this was [REDACTED], who was certain until he was subject to cross-examination and then he really did not know. When asked about this, Respondent said that he did not know who put out the transmission but "learned at the trial" it was [REDACTED]. Even coming from Respondent, this is hearsay because it is not based on his recollection.

More significant is the testimony of [REDACTED] on how these transmissions were made. He said it usually was done by the supervisor but essentially it could be passed off to someone else if the supervisor was busy. The method of transmission could have been

a Department Nextel cell phone, personal cell phone or Department radio. In the end, there is no solid evidence that [REDACTED] made the transmission; or if he did, that he was not simply relaying the information.

This leaves us then with Person A's testimony. Person A's statements come to this proceeding by way of [REDACTED]' testimony about what Person A said and the transcript of Person A's testimony at the criminal trial (DX 2).

The first problem with the Advocate's case is that reliance on what is, in essence, Person A's uncorroborated hearsay testimony may not be sufficient to meet the substantial evidence test as a matter of law.

Just as significant is the factual problem with relying on Person A's uncorroborated testimony. First of all, Person A admitted that he is a drug dealer, something which impacts on his credibility. Person A also admitted that he was in possession of a significant amount of cocaine on the day in question, conduct that would also impact on his credibility. Then there is the fact that Person A told two stories in the District Attorney's Office, something that again would reflect on his credibility.

Even more important is that in reviewing these two sources of what Person A said, there are some discrepancies. The most important of these is that [REDACTED] testified that Person A told him that he had bought narcotics in Manhattan for personal use. Yet when Person A was subject to cross-examination at the criminal trial, he agreed that he had bought the drugs so he could sell them. It should also be noted that at the criminal trial, Person A said that he did not do hand-to-hand drug transactions and that his narcotics business was based on making deliveries of the substance to buyers. But the different versions of what

his purpose was in buying 30 bags of cocaine create an issue of credibility that goes to the very essence of his testimony.

As to the Advocate's version of what occurred, it is certainly possible that [REDACTED] remembered Person A from an encounter six months earlier, but there was no evidence of it. For what it is worth, [REDACTED], who had been involved in that arrest, said he did not recall that he had previously encountered Person A when Person A was arrested on September 13, 2007. It is certainly possible that [REDACTED] invented the hand-to-hand and that he had Person A arrested for no reason other than his knowledge that Person A was a drug dealer based on that prior encounter. It is also possible that [REDACTED] saw a hand-to-hand and called it in with Respondent falsely taking credit for the observations. All of these things are possible but they are merely conjecture without proof. There is no such proof.

On the other hand, Respondent testified in this forum that he saw the hand-to-hand transaction, just as he had said in the paperwork that formed the basis for this case.

In this regard, it is necessary to review the conjectural arguments put forward by the Advocate to show that Respondent could not have seen this hand-to-hand transaction.

The claim that Respondent was too busy chasing Person B is addressed by Respondent, who said he made the observation of Person A while exiting his vehicle. He reasonably explained that he had to deal first with the matter at hand: the arrest of Person B. This is credible. Also challenged is Respondent's claim to have seen a hand-to-hand from a distance. The distance does not appear to have been so far as to preclude an observation, and of course observations of illegal drug sales are done at a distance by necessity. The claim that Person A knew there was a police operation and would surely not

conduct a hand-to-hand sale at that time does not necessarily hold water. For one thing, drug dealers do not always act rationally. For another, Person A, who claimed to have seen the police operation, might not have noticed it until he was in the midst of the drug transaction. In this regard, it should be remembered that Respondent said that he saw the hand-to-hand as that operation was starting.

All things considered, Respondent's testimony about what occurred seems reasonable and plausible.

Another issue that merits mention is the original claim that Respondent participated in the siphoning off of drugs with [REDACTED] and [REDACTED]. As noted at the outset of this proceeding, the Advocate stated that she was not pursuing that part of the case. While the Advocate did not explain that decision, [REDACTED] trial testimony (DX 3), which confirmed what Respondent said about practices in the unit, explained it.

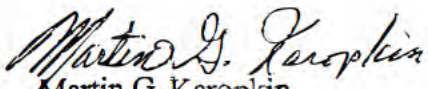
[REDACTED], in his trial testimony, confirmed that the arresting officer, which would have been Respondent that day, would search the prisoner and take the drugs but not count the drugs on the street. He confirmed that the drugs would be placed in an unsealed envelope which was then placed in the prisoner van. He also testified that the drugs were counted after they brought the prisoners back to the stationhouse. This would have allowed someone in the prisoner van to tamper with the evidence and take drugs out of the envelopes before they were counted. [REDACTED] was one of the officers in that van.

This fact, and the fact that the Advocate did not go forward with the entire original case, lends support to the contention by Respondent's counsel that Respondent had been assigned to a poorly run narcotics unit and was merely caught up in wrongdoing conducted by others to which he was not a part.

In the end, the Advocate relies on the hearsay representation by Person A that he did not conduct a hand-to-hand sale that day. This is insufficient to establish that Respondent fabricated the hand-to-hand sale he claimed to have seen.

Respondent is found Not Guilty.

Respectfully submitted,


Martin G. Karopkin
Deputy Commissioner – Trials

APPROVED

MAY 05 2014

WILLIAM J. BRATTON
POLICE COMMISSIONER